

The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and *Diversified Industries, Inc. v. Meredith*

I. INTRODUCTION

At the request of Diversified Industries, Inc., a law firm conducted an investigation of the corporation to uncover information regarding a "slush fund" that the Diversified Board of Directors suspected was being used to bribe purchasing agents of other businesses. The law firm presented the Board of Directors with several reports of its investigation containing, among other things, analyses of employee interviews and proposals for action by the Board. Corporate minutes discussed the reports and the proposals, and portions of those minutes, not including any part of the reports, were distributed to stockholders. Attracted by litigation surrounding a proxy fight within Diversified, the Securities and Exchange Commission conducted an investigation and subpoenaed the law firm's final report. Diversified subsequently provided the Commission with the reports on a confidential basis. As a result of the publicity surrounding these events, the Weatherhead Company sued Diversified for, among other things, tortious interference with Weatherhead employees. Weatherhead sought the law firm's reports to Diversified during pretrial discovery, and a motion for production of the documents was granted. The SEC maintained the confidentiality of the report, but Weatherhead obtained a copy from an individual defendant who had settled out of court.

In *Diversified Industries, Inc. v. Meredith*,¹ the Eighth Circuit Court of Appeals, in an en banc decision rejecting Weatherhead's demands, adopted a new test for the attorney-client privilege in the corporate context. The court abandoned the more widely used test—the control group test formulated by the District Court for the Eastern District of Pennsylvania in *Philadelphia v. Westinghouse Electric Corp.*²—for a modified version of a newer and less frequently used test first utilized by the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker*.³

The control group test limits the application of the attorney-client privilege to legal communications between attorneys and those corporate officers who are in a position to make discretionary decisions based on the advice engendered by the communications. The *Diversified* court refused

1. 572 F.2d 596 (8th Cir. 1978) (en banc). For other articles dealing with this case, see *Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith: New Rules for Applying the Privilege When The Client Is a Corporation*, 57 N.C.L. REV. 306 (1979); Note, *The Corporate Attorney-Client Privilege—A Compromise Solution: Diversified Industries, Inc. v. Meredith*, 11 CONN. L. REV. 94 (1978); Rothstein, *Attorney's Privileges Endangered by Three Recent Judicial Rulings*, Legal Times of Wash., Jan. 12, 1979, at 13, col. 1; Legal Times of Wash., Aug. 7, 1978, at 2, col. 2; Matthews & Klein, *Lessons for Would-Be "Special Counsel" from Diversified Industries Case*, Legal Times of Wash., June 12, 1978, at 8, col. 1.

2. 210 F. Supp. 483 (E.D. Pa. 1962). See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1978).

3. 423 F.2d 487 (7th Cir. 1970), *aff'd without opinion by an equally divided Supreme Court*, 400 U.S. 348 (1971).

to so limit the privilege, choosing instead the *Harper & Row* test, which extends the attorney-client privilege to legal communications in which the employee communicating with the attorney is acting in the course of his employment and at the direction of his superior. The Eighth Circuit, however, modified this test by imposing five limitations, suggested in *Weinstein's Evidence*,⁴ that are tailored to exclude routine reports, non-legal advice, and fortuitous witnesses from the privilege.⁵ It further held that communications with a lawyer were prima facie of a legal nature, and that the party seeking discovery must make a clear showing to the contrary to rebut this presumption.⁶ Applying this composite test to the case at bar, the court found that interviews of corporate employees by a law firm retained by the corporation to investigate wrongdoings and the resulting report were shielded from discovery by the attorney-client privilege. Furthermore, the court found that neither the inclusion of peripheral parts of the report in the corporate minutes nor the private disclosure to the SEC waived the privilege.

The following discussion will examine the recent history and status of the attorney-client privilege at the federal level, and will explore the Eighth Circuit's decision, its possible implications, and some alternative routes the court might have chosen or may choose in the future.

II. THE ATTORNEY-CLIENT PRIVILEGE

A. General Principles

Courts first recognized the attorney-client privilege in the sixteenth century. Originally, the privilege was based on the honor of the attorney—it belonged to him and he alone could waive it.⁷ During the eighteenth and nineteenth centuries, however, a new rationale of protecting the client arose, shifting the possession, and thus the capacity to waive the privilege, from the attorney to the client.⁸

The American Law Institute's rationale for the privilege is that:

In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the

4. 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(b)[04] (1979) [hereinafter cited as *WEINSTEIN*]; see note 78 and accompanying text *infra*.

5. 572 F.2d at 609.

6. *Id.* at 610.

7. 8 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2291, at 545 (rev. repl. 1961) [hereinafter cited as *WIGMORE*]; Pye, *Fundamentals of the Attorney-Client Privilege*, 15 *PRAC. LAW.* 15, 16 (1969).

8. *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.⁹

The common law structure of the privilege varies, but general guidelines can be formulated. The privilege extends to communications from client to attorney, or vice versa,¹⁰ and includes all communications that concern legal advice, whether or not made in anticipation of litigation.¹¹ The concept of a communication is to be interpreted broadly,¹² but the privilege extends only to the substance of the communications, not to the existence of or incidents to the attorney-client relationship itself.¹³ The privilege remains intact against discovery even if the client is not a party to the litigation.¹⁴ Confidentiality must exist actually and intentionally at the inception of the communication, however, and remain continuous throughout, or the privilege will be waived.¹⁵ Confidentiality extends only to the privileged group, however defined, and one member of this group may waive the privilege,¹⁶ even if done so unintentionally.¹⁷

As a general rule, waiver occurs when the policy underlying the rule can no longer be served or when there is a voluntary act of disclosure.¹⁸

9. MODEL CODE OF EVIDENCE rule 210, Comment a (1942).

10. *Natta v. Hogan*, 392 F.2d 686, 692-93 (10th Cir. 1968); *Giordani v. Hoffmann*, 278 F. Supp. 886, 889 (E.D. Pa. 1968). *But see* *Congoleum Indus. v. G A F Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969), and *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962) (no extension of the privilege to opinions of counsel).

11. The attorney-client privilege should not be confused with the work product privilege enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947) (now codified in FED. R. CIV. P. 26(b)(3)). In pertinent part, the federal rules, which became effective in 1970, provide:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3). briefly, the work product privilege is a qualified privilege—allowing discovery upon the showing of good cause—and thus is construed broadly. When subject and opinionated material is sought, however, it is normally construed strictly. While the attorney-client privilege belongs to the client, the work product privilege belongs to the attorney.

12. *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

13. *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964).

14. *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967).

15. *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546 (D.D.C. 1970); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954).

16. *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962).

17. *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954).

18. *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546 (D.D.C. 1970); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, (E.D. Mich. 1954). *See also* *W.R. Grace & Co. v. Pullman, Inc.*, 446 F. Supp. 771, 775 (W.D. Okla. 1976). There is a dispute whether communications between attorneys concerning a client are privileged. *Cf. Mead Data Cent., Inc. v.*

Any lapse in confidentiality constitutes a waiver of the privilege.¹⁹ Waiver extends to all communications relating to a particular subject, even if only part of those materials have been disclosed.²⁰ Prima facie evidence of fraud vitiates the privilege,²¹ and there is no privilege solely for the purpose of shielding documents in evasion of discovery.²²

For the purpose of defining the privilege, the court in *Diversified* followed the lead of some of the more recent decisions²³ and seemingly adopted Supreme Court Standard 503, a portion of the Proposed Federal Rules of Evidence not approved by Congress.²⁴ The Standard reads in part:

- (a) (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him. . . .
- (3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.
- (4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
- (b) General rule of privilege—A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.²⁵

United States Dep't of the Air Force, 566 F.2d 242 (1977) (consulting attorneys will not destroy confidentiality, creating in essence a second level privilege); *United States v. Covington & Burling*, 430 F. Supp. 1117 (D.D.C. 1977) (not privileged unless client communication is revealed).

19. *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954).

20. *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973); WIGMORE, *supra* note 7, § 2327 (the privilege may not be used as both a sword and a shield).

21. *Clark v. United States*, 289 U.S. 1 (1933); *Pfizer, Inc. v. Lord*, 456 F.2d 545, 548 (8th Cir. 1972); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); WIGMORE, *supra* note 7, § 2298.

22. *Natta v. Zletz*, 418 F.2d 633 (7th Cir. 1969).

23. See *In re grand jury proceedings*, Detroit, Mich., 434 F. Supp. 648, 648 n.1 (E.D. Mich. 1977); *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35 (E.D.N.Y. 1973) (note 1 comments on the appropriateness of the test asking, "what would be a more accurate expression of common law?"); McLaughlin, *The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 THE RECORD 30 (1971).

24. The en banc majority never explicitly adopted any definition of the attorney-client privilege. It can be inferred from this that Judge Heaney is building upon his dissent from the panel opinion in which he does use this test.

25. PROPOSED FEDERAL RULES OF EVIDENCE rule 503, 56 F.R.D. 235, 235-36 (1973).

B. *Application of the Privilege to Corporations*

It had been tacitly assumed for many years that the attorney-client privilege applied to corporations. The Seventh Circuit Court of Appeals was the first to actually apply the privilege in favor of a corporation in *Radiant Burners, Inc. v. American Gas Association*.²⁶ The special issues presented by the application of the privilege to the corporation concern the definitions of "attorney," "legal advice," and "client." The first issue is that of deciding which persons, from a collection of in-house and out-of-house counsel, members and non-members of the state bar, and patent advisors and business advisors, are to be designated attorneys for purposes of the privilege. The second issue simply consists of separating legal from nonlegal advice—a task conceptually simple but practically difficult when dealing with an entity whose sole purpose for existence is economic gain and whose every action is so directed. The third issue is determining which agents of a corporation are so closely identified with it that their actions would be considered those of the client corporation. These issues arise primarily from two sources: the inherent conflict between any privilege and the broad rules of discovery, and the difficulty of adapting a privilege created for the individual to a corporation.

An attorney has been defined as one who is primarily employed giving legal advice.²⁷ Courts have been willing to attach the privilege to both in-house and outside counsel.²⁸ It is also well settled that bar membership is not a prerequisite for the privilege to attach, especially for visiting counsel or house counsel and for interstate corporations.²⁹ The primary requirement is that the lawyer is acting in his capacity as a lawyer.³⁰ Communications between privileged officers of the corporation are also privileged if they deal with actual or proposed legal communications to an attorney.³¹ If business advice is sprinkled in with the legal advice it will still be privileged,³² but when the communication is primarily of a nonlegal nature, it will not be privileged.³³

Because the requirement of confidentiality mandates secrecy, and the finding of waiver requires the piercing of that secrecy, the test for agents of

26. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963).

27. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950); *see also* WEINSTEIN, *supra* note 4, § 503[02].

28. *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962); *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950).

29. *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954).

30. *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956).

31. *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 37-38 (E.D.N.Y. 1973); *see also* PROPOSED FEDERAL RULES OF EVIDENCE rule 503(b), 56 F.R.D. at 236 (1973).

32. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 361 (D. Mass. 1950).

33. *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954).

the corporation in its role as a client is of critical importance in any finding of fact. The initial and most widely used test for whether an individual is an agent of the corporate client is the "control group" test, formulated by the District Court for the Eastern District of Pennsylvania in *Philadelphia v. Westinghouse Electric Corp.*³⁴ In that case the court said:

Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.³⁵

Though adopted by many courts,³⁶ this test has been severely criticized for its failure to take the realities of large corporate structures into account. The test limits the privilege to a very restricted group of decision makers, leaving out all corporate advisors and various executives.³⁷ The real failure of the test lies in its explicit attempt to equate a corporation with an individual, without recognizing the specialization and division of labor inherent in a large corporation. By so doing, it virtually excludes all but a very few from the privilege. For instance, one commentator asks: if an employee has the power to render a corporation liable for damages, why should his communications to counsel not be privileged?³⁸

The Seventh Circuit rejected the control group test in *Harper & Row Publishers, Inc. v. Decker*,³⁹ saying:

We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is

34. 210 F. Supp. 483 (E.D. Pa. 1962).

35. *Id.* at 485.

36. *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *United States v. International Business Mach. Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Indus., Inc. v. G A F Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969); *Garrison v. Gen. Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963).

37. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1163-64 (D.S.C. 1974); *Burnham, The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901 (1969). For an example of executives and advisors excluded, see *Congoleum Indus., Inc. v. G A F Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969).

38. McLaughlin, *The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 THE RECORD 31, 33 (1971).

39. 423 F.2d 487 (7th Cir. 1970), *aff'd without opinion by an equally divided Supreme Court*, 400 U.S. 348 (1971).

sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.⁴⁰

The court further explained:

It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.⁴¹

The conflict between these two tests continues.⁴² The proponents of the control group test state that the control group is in effect the client,⁴³ that the test allows more open discovery,⁴⁴ and that the ease of applying and understanding the test creates a "bright-line" of protection more consonant with the purposes of the privilege than the *Harper & Row* test.⁴⁵ The proponents of the *Harper & Row* test argue that the control group test is overly restrictive and impossible to apply to a large corporation; it must either fail or be arbitrary.⁴⁶ Yet many courts, showing a conservatism echoing that of Judge Campbell in the first *Radiant Burners* decision,⁴⁷

40. *Id.* at 491.

41. *Id.*

42. See *In re Ampicillin Antitrust Litigation*, 78-1 TRADE CAS.

62,043 (D.D.C. 1978); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); and note 83 *infra* In *Duplan* the court ostensibly chose the control group test but in effect interpreted it as the *Harper & Row* test, saying:

A corporation cannot deal solely through the chairman of the board of directors. There has to be a sufficient number of persons within a corporation who are authorized on behalf of the corporation to seek advice, to give information with respect to the rendition of advice, and to receive advice. . . .

This is an antitrust case. If the chairman of the board and the president of a corporation were to seek advice on antitrust law, the only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do, within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesman. . . . if an attorney cannot make enquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. . . . unless corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the Federal Antitrust Laws is likely to be adversely affected.

397 F. Supp. at 1164. See *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), for another test. The California Court's test requires the "natural person" to be speaking for the corporation, or the speaker's connection with the matter to have arisen out of his employment in the ordinary course of business, or the communication to be at the direction of a superior. For other proposed tests, see Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970).

43. *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970).

44. *Virginia Elec. and Power Co. v. Sun Shipbuilding and Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975).

45. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970) (A "bright-line" test allegedly increases the predictability of the privilege, encouraging more corporations to make use of it with confidence.).

46. Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972).

47. 207 F. Supp. 771 (N.D. Ill. 1962).

reject the *Harper & Row* test using language similar to that of the Tax Court in a recent case:

It would appear that the *Harper & Row* formula would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege "should be strictly confined with the narrowest possible limits consistent with the logic of its principle." *United States v. Goldfarb*, [328 F.2d 280, 282 (6th Cir. 1964)].

It would also appear to open the door to the danger envisioned by the Supreme Court in *Hickman v. Taylor*, [329 U.S. 495, 506 (1947)]:

"Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents."⁴⁸

III. *Diversified Industries v. Meredith*

A. *Facts and Background*

Diversified Industries, a Delaware corporation, had for a number of years sold large quantities of copper to the Weatherhead Company, an Ohio corporation. In light of information appearing during several shareholder suits against Diversified in 1974 and 1975, it appeared that Diversified may have established and maintained a "slush fund" to bribe purchasing agents of other businesses, including Weatherhead.

In the spring of 1975, the Board of Directors of Diversified decided to employ the law firm of Wilmer, Cutler & Pickering to investigate the business practices of the corporation in light of the disclosures that had been made during the shareholder's suits. A memorandum from the law firm, directed to the Board and received in June 1975, outlined the method of investigation and the extent to which the information would be immune from disclosure.

In July 1975, Weatherhead commenced suit against Diversified, alleging an unlawful conspiracy between Diversified and Weatherhead employees, tortious interference with the contractual relationships between Weatherhead and its employees, and violation of the Clayton Antitrust Act.⁴⁹ Meanwhile, the Securities and Exchange Commission was attracted by the 1974-75 litigation and, in due course, conducted an official investigation of the affairs of Diversified. It later filed suit for an injunction against Diversified, and a consent decree was entered in that case in late 1976.

In December 1975, the law firm made a full and detailed report of the investigation to the Diversified Board of Directors. The report gave the substance of the law firm's interviews with Diversified's employees and identified those who refused to give any information. The report also dealt

48. *United States v. Upjohn Co.*, 78-1 U.S. Tax Cas. 9277, at 83,602 (W.D. Mich. 1978).

49. 15 U.S.C. § 15 (1976).

with the accounting aspect of the investigation, which had been handled by the accounting firm of Arthur Anderson & Co. The report evaluated the information and stated the conclusions and recommendations of both the law firm and the accounting firm to Diversified. Certain corporate minutes and part of an intracorporation letter restated critical portions of the report.⁵⁰ Weatherhead sought to obtain these materials by pretrial interrogatories and a motion for production of the documents. Diversified objected, arguing that the documents fell within the scope of the attorney-client privilege.

B. *Factual Caveat*

The *Diversified* opinion is in some places confusing or vague because of factual inconsistencies and analytical omissions. The inconsistencies were undoubtedly caused both by the comparatively short period of time allowed for the filing of the briefs⁵¹ and by changes in the factual situation as the litigation progressed and the opinions were written. The omissions were most likely refusals of the court to decide more than actually needed.

The most cryptic aspect of the opinion deals with what was referred to in various parts of the opinion as the "serious question of mootness"⁵² or "the change in circumstances in the litigation."⁵³ The dissenting opinions of Judge Henley and Judge Bright both referred to disclosures made by the SEC to Weatherhead of the *Diversified* report,⁵⁴ while Judge Heaney referred to a disclosure without mentioning the source.⁵⁵ While the majority held that the "litigants are not foreclosed from obtaining the same information from non-privileged sources,"⁵⁶ it refused to dismiss the petition on grounds of mootness.⁵⁷

This presents two problems—one factual and one analytical. The opinions are plainly wrong factually. The report was submitted to the SEC by Diversified without restrictions.⁵⁸ The SEC, however, wished to keep it confidential for policy reasons.⁵⁹ This was an allowable exception to the Freedom of Information Act as an ongoing investigation by a government agency.⁶⁰ Although certain disclosures were made by Diversified via a

50. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 600-01, 607 (8th Cir. 1978).

51. *Id.* at 599.

52. *Id.* at 612.

53. *Id.* at 617.

54. *Id.* at 612, 617.

55. *Id.* at 611 n.6.

56. *Id.* at 611.

57. *Id.* n.6.

58. Telephone interviews with Mr. Hal D. Cooper of Jones, Day, Reavis & Pogue in Cleveland, Ohio (Jan. 24, 1979), and with Mr. Walter M. Clark of Armstrong, Teasdale, Kramer & Vaughan in St. Louis, Mo. (Feb. 28, 1979). See also Memorandum of The Weatherhead Co. in Opposition to Writ of Mandamus at 8-9.

59. Boeig Consent Order. No. 78-1383 (D.D.C. July 28, 1978). See note 129 and accompanying text *infra*.

60. Privacy Act of 1974, 5 U.S.C. § 552a(j)(2) (1976).

public 10-K filing with the SEC,⁶¹ the SEC never released the report.⁶² A copy of the report, however, was given to Weatherhead by one of the individual defendants as part of an out-of-court settlement.⁶³

The various opinions do not clear up the matter at all, with off-the-cuff remarks concerning mootness in interplay with the clear holding that "non-privileged sources" are fair game for discovery. The principal cause of this confusion is the court's failure to distinguish between the effect of the privilege upon discovery in contrast to the effect upon the admissibility of the communication as evidence in trial. The attorney-client privilege is normally one that only extends to discovery,⁶⁴ but Judge Heaney's discussions of limited waiver,⁶⁵ as well as his seeming adoption of a rule excluding testimony of eavesdroppers,⁶⁶ brings the scope of the privilege into question.⁶⁷

These observations are only peripherally relevant to the major portions of the opinions and will be treated in their respective places in this paper. Nevertheless, the reader should take note of Judge Henley's statement in his dissent that

[i]n another factual setting I would have no trouble agreeing with much of what is said by way of principle in the opinion of the court. As it is, I am of the view that the majority's holding on the issue of attorney-client privilege simply is not geared to the facts of the instant case.⁶⁸

C. Preliminary Holdings

The appeal was first heard by a three judge panel of the Eighth Circuit, which, although holding that mandamus was an appropriate avenue for appellate review,⁶⁹ denied the petition in full in an opinion by Judge Henley. Judge Heaney filed a concurring and dissenting opinion. The decision was reversed in part on hearing en banc—Judge Heaney delivering the four to three decision.

The court en banc upheld Judge Henley's rejection of Diversified's request for the work product privilege. Although the court recognized that the work product privilege is to be applied to a broad range of subject matter because it is a qualified privilege, and though the contents of the report definitely constituted the law firm's work product, the court found

61. Memorandum of the Weatherhead Co., *supra* note 58.

62. Telephone Interviews, *supra* note 58.

63. *Id.*

64. WIGMORE, *supra* note 7, §§ 2325-26, at 633-34 (waiver will be found even if involuntary or by theft, etc.).

65. 572 F.2d at 604, 611. See text accompanying note 118 *infra*.

66. PROPOSED FEDERAL RULES OF EVIDENCE rule 503, 56 F.R.D. at 238 (1973) (Advisory Committee's Note).

67. See Judge Henley's observation that "[I]t may be doubted that the report itself would be admissible in evidence at a trial . . ." 572 F.2d at 601.

68. *Id.* at 616.

69. *Id.* at 599, 604, 607, 611.

the report to be not privileged because it was not done in anticipation of litigation as that phrase is used in rule 26(b)(3) of the Federal Rules of Civil Procedure.⁷⁰ The two opinions also agreed in upholding the district court's denial of the privilege for the preliminary memorandum of June 1975, which outlined the scope and method of the investigation. The court concluded that the memorandum was clearly not privileged because it revealed no confidential information; the memorandum merely described the relationship between the law firm and Diversified.⁷¹

The question of mootness was only briefly addressed by the en banc majority, which stated in a footnote:⁷² "On remand, the District Court may determine what further action, if any, is appropriate in the light of this Court's holding that the report is privileged."⁷³ Apparently the majority did not hold that the issue was not moot; rather it was remanding the dispute to the district court for that court's determination of fact in light of the decision of the higher court. This was an adoption of the appellant's argument "that the issue which may be at stake in later proceedings, when properly defined, will not be one of 'mootness' but rather that of waiver, and will be in the District Court only after the issue of privilege is decided here."⁷⁴

D. *Client Test*

In addressing the core of the attorney-client privilege, the *Diversified* court first adopted a rule of broad applicability of the privilege and then restricted and somewhat obscured the boundaries of that applicability. This was accomplished by adopting a modified version of the *Harper & Row* test⁷⁵ to identify the group of corporate agents who were to be shielded by the privilege. The court stated that, in its original form, the test extended the privilege to those situations in which "the employee makes the communication at the direction of his superiors . . . and where [the] subject matter . . . in the communication is [within] the performance by the employee of the duties of his employment."⁷⁶ The *Diversified* court noted, however, that critics of the test had argued that many corporations would attempt to funnel most corporate communications through their attorneys in order to prevent subsequent disclosure.⁷⁷ To prevent such an abuse of the privilege, the court restricted the *Harper & Row* test by

70. *Id.* at 604; see note 11 *supra*.

71. *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 214-15 (N.D. Ill. 1972).

72. 572 F.2d at 611 n.6.

73. *Id.*

74. Reply of Counsel for Petitioner Diversified Industries, Inc., to Dec. 30, 1977, Letter from the Clerk of the Eighth Circuit Court of Appeals at 3 (Jan. 9, 1978).

75. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491, (7th Cir. 1970), *aff'd without opinion by an equally divided Supreme Court*, 400 U.S. 348 (1971).

76. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1978) (en banc).

77. *Id.* at 609.

adopting several limitations of the subject matter and confidentiality suggested by Judge Weinstein:

(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements.⁷⁸

The *Diversified* court, however, qualified the corporation's burden of proof. In providing a touchstone for the ambiguous first requirement—that the communication be made for the purpose of securing legal advice—the court deferred to the language of Dean Wigmore:

It is not easy to frame a definite test for distinguishing *legal from nonlegal advice*. . . . The most that can be said by way of generalization is that a matter committed to a professional legal adviser is *prima facie so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice. Obviously, much depends upon the circumstances of individual transactions.⁷⁹

This composite test is a new synthesis. Although the standards are all borrowed, none were ever popular, nor were they ever combined as they were in *Diversified*. The complexity of Judge Weinstein's conditions and their susceptibility to subjective application constitute a rebellion against the mainstream school of simplicity and objectivity.⁸⁰ The *Harper & Row* test had been available for eight years, yet few courts were willing to use it.⁸¹ For, like the *prima facie* assumption of legal advice, it flies in the face of the conservative attitude of the majority of courts that the privilege, because absolute, should be strictly construed.⁸²

Not only is the composite test subject to arguments against its breadth and subjectivity, but it also has the potential of failing mechanically from an overly narrow interpretation. The second of Weinstein's limitations (also part of the *Harper & Row* test)—that the employee making the communication do so at the direction of his corporate superior—has the potential of limiting the privilege as strictly as or even more strictly than

78. *Id.*, citing WEINSTEIN, *supra* note 4, ¶ 503(b)[04].

79. 572 F.2d at 610, quoting WIGMORE, *supra* note 7, § 229b (emphasis by court).

80. See cases cited in note 36 *supra*. But see *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974).

81. See, e.g., Note, *supra* note 45. See generally Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972).

82. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 612 (8th Cir. 1978) (en banc) (Henley, J., dissenting), citing *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963). See also WIGMORE, *supra* note 7, § 2291 ("Nevertheless the privilege remains an exception. . . .").

the control group test. In fact, if this requirement were read in a very limited sense, it might even exclude a peripheral member of the control group who was not acting on the explicit order of his superior. For example, one who was in a "position to take a *substantial part* in a decision" could yet have superiors. Acting without their explicit direction could vitiate the privilege due to this requirement. A department head might not conduct an investigation on his own. Control group management might not act without direction from the board of directors. By not specifying what is meant by "corporate superior," this requirement *reductio ad absurdum* could even limit the privilege solely to actions originating from the chairman of the board of directors. A strict reading of Weinstein's second limitation could result in this test being more restrictive than a liberal reading of the control group test—which does allow extending the privilege to any employee acting as an agent of the control group.⁸³

Weinstein's fifth requirement—that the communication not be disseminated beyond those persons who because of the corporate structure need to know its contents—creates some problems with good faith compliance. Which officers in a corporation truly need to know the legal business of areas outside their own special interests? Although the *Diversified* court extended the privilege to the corporate minutes, it is likely that not all those present at the meeting were persons with a compelling "need to know." Yet how may a corporation formulate any large-scale policy without an airing of the problem at a board of directors meeting? It is possible, even probable from the court's actions in this fact situation, that absent any unusual circumstances, the privilege will normally be extended to internal disclosures within the ordinary course of business. Due to the language of this requirement, however, this conclusion is not incontrovertible.⁸⁴

This broad range of possible interpretations could destroy the value of the composite test. Were corporations to view this test narrowly and some courts to interpret it broadly, the legal system would be cut by both edges of the sword. A corporation fearing the possibility of a narrow interpretation would not communicate as freely with its counsel. On the

83. For a broad reading of the control group test, see *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-65 (D.S.C. 1974). This composite test has been criticized recently by the court in *In re Ampicillin Antitrust Litigation*, 78-1 TRADE CAS. ¶ 62,043 (D.D.C. 1978). This court rejected the control group test and the *Harper & Row* test. Rather than base its test upon the requirement of a directive from a superior to an employee (as in *Diversified*), the *Ampicillin* court required that the communication be "*reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought." *Id.* at 74,510 (emphasis in original). This test is more closely tailored and conceptually a better test than the composite test here, but it could present some difficult problems in application due to its reliance upon the necessary evaluation of the employee's intent. See also *D. I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (the "natural person" test).

84. The other numbered requirements are relatively pointless and hopefully harmless. Requirements one and four are superfluous given the definition of the privilege adopted by the court. Requirement three follows naturally from requirements one and two when read together.

other hand, an expansive interpretation of the privilege would increase its effect as an obstacle to truthfinding in the courtroom.

In his dissent, Judge Henley objected to allowing a *prima facie* assumption that the communications were for legal advice, arguing that the majority was extending Wigmore's language beyond reasonable limits.⁸⁵ This is a weak objection. Although the majority's burden of a "clear showing" is greater than that normally used to satisfy a burden of production, due to the difficulty (particularly acute in a business context) of identifying advice solely legal in character, the barrier must be raised high enough that a legitimate and substantial argument is needed for disclosure. To hold otherwise could open the path to frivolous or blind requests for any legal communication by the adverse party. Although any request is in a sense blind until the material is discovered, the burden on the "blind" party is not so great that he cannot feel his way. All legal rules exact a price. After all, though such forays are not prohibited, the privilege is not constructed with primary deference to "fishing expeditions."⁸⁶ In any case, the burden of proof that the elements of privilege were satisfied rests upon the party seeking protection, and *in camera* review is available when necessary. The burden on the party seeking disclosure is light enough to ensure that the privilege is not so formidable that it will eliminate disclosure when merited.

A substantial difficulty with the composite test is the court's attitude toward the concept of the fortuitous witness—employees who by chance observe events that may generate liability on the part of the corporation,⁸⁷ or those who have no need to know the substance of a communication, yet do know it.⁸⁸ The *Harper & Row* court expressed no opinion with respect to the fortuitous witness.⁸⁹ On the one hand, section 503(b) of the Proposed Federal Rules of Evidence—apparently adopted by the *Diversified* court⁹⁰—abandons the position that an eavesdropper may testify to overheard privileged information.⁹¹

On the other hand, Weinstein's fifth limitation—that the communication not be "disseminated beyond those persons who . . . need to know its contents"—gives the impression that the fortuitous witness who had no specific "need to know" the contents of the communication would not be subject to the privilege. This interpretation hinges upon whether the word

85. 572 F.2d at 613.

86. Great deference is not given to one attempting to find a wrong, that is, not seeking to redress a wrong reasonably believed to have occurred. *Segal v. Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972). *But cf.* *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponents' case.").

87. *See Harper & Row Publishers, Inc. v. Decker*, 423 F.2d at 491.

88. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc).

89. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d at 491.

90. 572 F.2d at 605. No mention is made of the actual test used in the full en banc opinion. *See* note 24 *supra*.

91. PROPOSED FEDERAL RULES OF EVIDENCE rule 503, 56 F.R.D. at 238 (1973) (Advisory Committee's Note, subdivision (b)).

“dissemination” is interpreted as including an element of intent, and whether the phrase “need to know” is interpreted narrowly.

There is no good reason to find waiver of a privilege simply because there existed a limited breach of confidentiality with a party who works in close proximity to one to whom the privilege attaches. The purpose of the privilege is to maximize the free flow of information within a corporation with the minimum adverse effect upon discovery. This rule would ostensibly charge a corporation with a strict task of secrecy—probably much more strict than most corporations are able to practice. If this rule were strictly interpreted, it would be difficult to employ; if loosely interpreted, it would be ambiguous. The privilege attempts to perform its function by instilling some sense of security in the client with respect to his communications. The threat of discovery from mistake or mere happenstance reduces this security considerably, constricting the primary goal of the privilege. A rule that is arbitrary or ambiguous is more likely to reduce the free flow of information from the fear of a rare leak than it is to increase discovery from that same rare leak. Although Wigmore states that the costs of the privilege are concrete and the benefits are questionable,⁹² the costs are incurred sporadically while the benefits accrue daily. While in a rare case discovery will be maximized by the happenstance of a fortuitous witness, in every case a great reduction of internal communication will result from the corporation’s extreme care to guard against that fortuitous witness.

It is doubtful, however, that the composite test could be given a restrictive reading. The context in which the test was formulated, in terms of the opinions of both Judge Henley and Judge Heaney, and the context of the formulation of Weinstein’s tests, would encourage a broad reading. Weinstein’s limits were explicitly created to provide safeguards, thus encouraging use of the broader *Harper & Row* test and hopefully supplanting the narrow and often arbitrary control group test.⁹³ Judge Heaney echoed the criticism that the control group test equates the corporation with the individual and fails to account for the realities of the corporate structure that require confidential knowledge to be widely disseminated. The largest corporations have the greatest need of counsel due to their internal complexity. Yet because of the great number of employees of these corporations, they are afforded the least protection by the control group test. These corporations, in particular, are difficult to police externally due to great internal complexity. Self-policing appears more favorable simply because of cost. Although the more extensive discovery possible under the control group test might reveal more useful information in the short run, sources of material created by the defendant corporations and available for discovery would dry up as these firms recognized the danger of the use of legal communications and internal

92. WIGMORE, *supra* note 7, § 2291.

93. WEINSTEIN, *supra* note 4, ¶ 503(b)[04].

policing. This would leave the legal system with information available for use by neither the corporations nor their potential adversaries. A broad interpretation of the attorney-client privilege is thus necessary if the existence of information possessed by the defendant corporation alone is to be preferred to the existence of no information at all.

The positive arguments for the composite test are persuasive only if the test is given a broad interpretation that expands the protection afforded the corporation by the privilege. Although the court did not expressly incorporate this consideration into its test, the availability of the information from other sources influenced its decision.⁹⁴ Corporate policing of internal affairs should be protected, particularly when the raw research data (e.g., employee interviews) collected is available to other parties through other avenues (e.g., depositions).⁹⁵ A broad scope for the corporate attorney-client privilege, such as that provided by the *Diversified* court, will facilitate self-policing. Denial of the protection will correspondingly discourage it. Judge Heaney, quoting the Association of the Bar of the City of New York, argued that "rules of evidence should not result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity."⁹⁶ If this objective becomes a part of the composite test, this test could prove adequate in encouraging the free flow of information to and from the corporation's counsel, in spite of the availability of ostensibly strict limitations.

E. Waiver

1. Disclosure of the Report to the SEC

Waiver affects the attorney-client privilege's element of confidentiality. Confidentiality is considered necessary; any justification for the privilege disappears without it. If the matter is never intended to be confidential, the privilege will never attach, even if there exists confidentiality in fact, again because the justification for the privilege is absent. Thus, the abandonment of confidentiality is not necessarily a post facto waiver, but in truth may be merely an indication that no confidentiality was ever intended. A breach of confidentiality may also be a result of the erosion over time of the necessity of the privilege or a result of

94. 572 F.2d at 611.

95. It is questionable how appropriate this observation is to the particular case. Of eight *Diversified* employees interviewed by Weatherhead, five claimed the self-incrimination privilege, and the other three professed ignorance to anything of substance. Memorandum of the Weatherhead Co. in Opposition to Writ of Mandamus at 6-7 n.1. It has been suggested that the courts need not protect the communications of lower level employees since this will have no effect upon their lucidity. Having no control over the privilege themselves, the lower employees will be no more likely to talk with the privilege than without. *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979). This view, however, ignores the fact that it is the employer who conducts the interviews, and it is the employer's effort that needs encouragement.

96. REPORT OF THE COMM. ON FED. COURTS OF THE NEW YORK COUNTY LAWYERS ASS'N 7-10 (1970), reprinted in WEINSTEIN, *supra* note 4, ¶ 503[01], at 503-12 n.1.

the privilege encompassing evidence of greater benefit to its possessor than his opponent. These last two would be bona fide waivers.

Opposed to this strict construction of the attorney-client privilege is the policy of encouraging compliance with government regulatory agencies. To lubricate the regulatory process, courts have been reluctant to impose any excess burdens on corporations voluntarily complying with orders of the SEC, the IRS, and other government agencies. Likewise, when possible, these agencies use non-public actions to encourage disclosure with the least friction.

Suspended between these two policies hangs the basic factual determination whether a "voluntary disclosure" exists in a particular case. In question is whether a contested response to a court-ordered subpoena is voluntary (or perhaps the question concerns the degree of voluntariness),⁹⁷ and whether a private disclosure is truly an adequate disclosure for purposes of waiving or destroying the privilege.

Prior to Weatherhead's suit against Diversified, the report had been surrendered without contest to the SEC pursuant to an agency subpoena. Whether this limited disclosure constituted a waiver of the privilege was an important issue with which the court dealt rather lightly. Perhaps this is excusable in consideration of the scarcity of any holdings dealing with waiver of the attorney-client privilege in response to a government subpoena. Since the two opinions most directly on point reached opposite results, however, it would have been helpful for the court to explain its position.⁹⁸

The first of these two cases, both of which were cited by Judge Heaney without comment, is *Bucks County Bank and Trust Co. v. Storck*.⁹⁹ The court's explicit holding in that case was that testimony that would otherwise be protected by the attorney-client privilege,

given by a client at a hearing, whereby the client defendant by motion seeks the return of property taken from him by an alleged illegal search and seizure, is given for the purpose of such motion, alone, and does not constitute a general waiver of privilege by the client defendant, and it is equally clear that such evidence is not usable against the defendant even in the criminal case in chief in connection with which a return of property or suppression of evidence is sought.¹⁰⁰

97. Weatherhead argued that Diversified should have asserted its privilege against the SEC. Memorandum of the Weatherhead Co. in Opposition to Writ of Mandamus at 29 n.6 ("The attorney-client privilege, if properly asserted, can be raised before that Commission or any other agency, just as it may be in a judicial proceeding."). See *SEC v. First Security Bank of Utah*, 447 F.2d 166 (10th Cir. 1971), cert. denied, 404 U.S. 1038 (1972); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962).

98. These two opinions are *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973) and *Bucks County Bank and Trust Co. v. Storck*, 297 F. Supp. 1122 (D. Hawaii 1969). They address the issue of whether material is privileged by the attorney-client privilege pursuant to a court-ordered subpoena. Generally, other cases deal with this problem only in the context of the self-incrimination privilege. See, e.g., *United States v. Goodman*, 289 F.2d 256 (4th Cir.), vacated on other grounds, 368 U.S. 14 (1961).

99. 297 F. Supp. 1122 (D. Hawaii 1969).

100. *Id.* at 1123.

The numerous qualifications in this language indicate that the Hawaiian court was restricting the holding to the particular facts in that case. Although this case could possibly stand for the proposition that there is either no waiver or a nongeneral waiver because of disclosure in a preceding hearing, most likely the court intended no more than the expansion of the defendant's fourth amendment rights.

In *In re Penn Central Commercial Paper Litigation*,¹⁰¹ the attorney for the defendant disclosed otherwise privileged material of a third party to the SEC with the approval of that third party. Though the third party was not a party to the instant action, the court for the southern district of New York ordered the material to be disclosed. The court stated: "[We] must reject defendant's contention that the kind of disclosure that we are confronted with—i.e., one made during a nonpublic SEC investigation—does not effect a waiver of the attorney-client privilege."¹⁰² Although the defendant argued that this decision would make witnesses less willing to cooperate with authorities, the court held this was "an inadequate basis for a court to break new legal ground against the *overwhelming weight of authority*."¹⁰³ Strangely enough the court made this bold statement without citing a single case. Although one sentence later the court cited several cases supporting the proposition that the privilege cannot be selectively waived,¹⁰⁴ it gave neither rationale nor authority for calling a non-public disclosure either a waiver or a selective waiver.

Both the *Penn Central* and the *Diversified* opinions found the disclosures to the SEC to be voluntary. The *Diversified* court, however, indicated that the non-public aspect of the hearing caused this to be only a limited waiver.¹⁰⁵ The court did not clearly explain what it meant by "limited waiver."

This finding is questionable only because the confidentiality of the SEC proceedings is for the benefit of the SEC and not for the witnesses appearing before it.¹⁰⁶ Thus, it would seem that the privilege belongs to the

101. 61 F.R.D. 453 (S.D. N.Y. 1973).

102. *Id.* at 464.

103. *Id.* at 464 (emphasis added).

104.

See, e.g., Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970). ("It would be patently unfair for a client to disclose those instances which please him and withhold all other occasions."); United States v. Krasnov, 143 F. Supp. 184, 191 (E.D. Pa. 1956), *aff'd per curiam*, 355 U.S. 5 (1957) ("The privilege once waived cannot be regained . . ."); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-65 (E.D. Mich. 1954) ("If the client waives the privilege at a first trial, he may not claim it at a subsequent trial, because after the first publication the communication is no longer confidential and there is no reason for recognizing the privilege."); United States v. Shibley, 112 F. Supp. 734, 742 (S.D. Cal. 1953) ("[W]hen the client and attorney themselves, for purposes beneficial to the client, lift the veil, they cannot lower it again.").

Id. n.26 (in full).

105. This is somewhat in conflict with a previous opinion of the same court, holding that a disclosure in prior proceedings under subpoena waives the attorney-client privilege for confidential communications. *Steen v. First Nat'l Bank*, 298 F. 36, 41. (8th Cir. 1924). The *Steen* case, however, involved the same action—not two separate actions.

106. *LaMorte v. Mansfield*, 438 F.2d 448, 450 (2d Cir. 1971).

SEC and does not remain solely with the original claimants. If the SEC proceedings are private pursuant to regulations or even policy, however, the option to disclose is limited. In the case of *Diversified's* disclosures to the SEC, amendments to The Freedom of Information Act passed pursuant to The Privacy Act of 1974¹⁰⁷ exempted the SEC from forced disclosure and would arguably remove the option to disclose entirely.¹⁰⁸ Without that option, the control of the privilege rests with the original claimants.¹⁰⁹ In any case, the SEC favors maintaining confidentiality.¹¹⁰

Two months after the *Diversified* opinion was handed down, the District Court for the Western District of Michigan decided the case of *United States v. Upjohn*,¹¹¹ which had virtually the same fact pattern as *Diversified*. The court adopted the findings of a United States Magistrate, who, using the control group test, found that no privilege existed—and had it existed, it would have been waived by disclosures to the SEC and to the IRS. The magistrate did not elaborate upon the concept of waiver; rather he cited a number of cases and included a few quotations with little comment. Most notably, he did not distinguish between the disclosure to the disinterested SEC and that to the party seeking disclosure: the IRS. He merely stated that disclosure to both the SEC and the IRS waives the privilege. Whether disclosure to either waives the privilege is not clear.

The cases cited by the magistrate offer little instruction with regard to the disclosure to the SEC. The quotations from *Duplan Corp. v. Deering*

107. 5 U.S.C. § 552a(j)(2)(1970).

108. This is a contested matter, although it seems that the agency retains control. See *Chrysler Corp. v. Brown*, 99 S. Ct. 1705 (1979). See also Huffman, *No One Knows Who Won 'Chrysler' Case*, *Legal Times of Wash.*, April 23, 1979, at 1, col. 2. Cf.: "A disclosure which is itself privileged . . . by the common law . . . or by lawful contract, shall not constitute a waiver." *Wearly v. FTC*, 462 F. Supp. 589, 597 (D.N.J. 1978); WEINSTEIN, *supra* note 4, ¶ 511[02], at 511-6.

109. *Diversified* referred the court to *Boehm v. United States*, 123 F.2d 791 (8th Cir. 1941), where the Eighth Circuit commented that "[t]he Securities and Exchange Commission . . . performs a function similar to that of a grand jury." *Id.* at 808. *Diversified* then argued that the rationale which underlies the maintenance of the privilege before the grand jury would uphold it in this case also. Reply Brief of Petitioner *Diversified Industries, Inc.* at 17. This is a non sequitur. *Diversified* was fully able to assert the privilege before the SEC, yet failed to do so. Neither should this analogy aid *Diversified* with regard to waiver, since the attorney-client privilege generally occupies a status before a grand jury no different than elsewhere. See, e.g., *United States v. Calandra*, 414 U.S. 338, 346 (1974). Courts may find a waiver in a grand jury proceeding sooner than in other proceedings. *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979) ("Since *Diversified* did not require judicial intervention in the grand jury process, we do not find it to be controlling here."). See also *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973).

110. See note 130 and accompanying text *infra*.

111. 78-1 U.S. TAX CAS. ¶ 9277 (W.D. Mich. 1978). The United States Magistrate received a copy of the *Diversified* opinion shortly after submitting his recommendation to the district court. After reviewing the opinion, he reaffirmed his conclusions of his earlier report to the district court. Letter from Stephen W. Kerr, United States Magistrate, to The Honorable Noel P. Fox, Chief Judge, Western District of Michigan (Mar. 13, 1978). The district court also reconsidered the opinion, rejecting the *Diversified* view. 78-1 U.S. TAX CAS. ¶ 9437. The Sixth Circuit Court of Appeals upheld the district court with regard to the "control group" test, stating that a subject matter test would encourage purposeful ignorance of unpleasant facts by control group management. 79-2 U.S. TAX CAS. ¶ 9457, at 87,681. The case was remanded to the district court, however, to uphold the privilege when control group communications were involved. *Id.* at 87,682. Waiver was held to apply only to the facts actually disclosed to the SEC. *Id.* at 87,681 n.12. This of course destroys any concept of partial disclosure so roundly criticized by the magistrate. See this note *supra*. At the same time no mention was made of any disclosure to the party at suit. See this note *supra*.

Millikin, Inc. and Burlington Industries v. Exxon Corp. merely condemn selective disclosure.¹¹² *United States v. Cote*¹¹³ held that the workpapers of an accountant carry no privilege when used for filing amended returns. This also was merely a case of selective disclosure to the party seeking discovery. The cases of *United States v. Schoeberlein*¹¹⁴ and *B & C Trucking Co. v. Holmes & Narver, Inc.*¹¹⁵ were cited by the magistrate as standing for the proposition that disclosure to a government agency waives the privilege. The last two cases, however, are not on point.

In *B & C Trucking*, the disclosure to the Atomic Energy Commission was not pursuant to a contract, regulation, request, or subpoena.¹¹⁶ This is certainly not analogous to a disclosure pursuant to a subpoena, as in *Diversified* and *Upjohn*. The magistrate stated that in the *Schoeberlein* case the disclosure to the Federal Communication Commission waived the attorney-client privilege with regard to the IRS. In actuality, however, the court in *Schoeberlein* considered the privilege waived not because of the previous disclosure to the FCC, but because of a previous disclosure to the opposing party in the suit: the IRS.¹¹⁷ Thus, although there is some precedent for allowing disclosure to the IRS pursuant to a previous disclosure, the magistrate made no effort to distinguish between disclosure to a third-party agency pursuant to its request and disclosure to an agency that is a party to the action, or to an agency pursuant to no solicitation.

The *Diversified* opinion is really no clearer than the *Upjohn* opinion. The former uses the term "limited waiver" without clarification. Judge Heaney, in his dissent from the panel court opinion, would have limited the waiver to the particular proceeding. His en banc opinion does not explicitly adopt this position; rather he cites the cases he cited in his panel dissent as basic source material.¹¹⁸ These two cases—*Buck's County Bank & Trust Co. v. Storck*¹¹⁹ and *United States v. Goodman*¹²⁰—limit the waiver to the proceeding concerned. This would be a drastic broadening of the privilege, however, allowing the client to assert the privilege against an agency to which a disclosure had previously been made.¹²¹ As noted

112. 78-1 U.S. TAX CAS. ¶ 9277, at 83,603, citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1162 (D.S.C. 1974); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974). See note 20 and accompanying text *supra*.

113. 456 F.2d 142 (8th Cir. 1972).

114. 335 F. Supp. 1048 (D. Md. 1971).

115. 39 F.R.D. 317 (D. Hawaii 1966).

116. *Id.* at 319.

117. *United States v. Schoeberlein*, 335 F. Supp. 1048, 1057 (D. Md. 1971).

118. See THE HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION rule 2:3 (12th ed. 1976).

119. 297 F. Supp. 1122 (D. Hawaii 1969).

120. 289 F.2d 256 (4th Cir.), *vacated on other grounds*, 368 U.S. 14 (1961).

121. Waiver of the self-incrimination privilege has traditionally been limited to the proceeding involved. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE ¶ 132, at 281-82 (2d ed. Cleary ed. 1972). With regard to the attorney-client privilege, it is clear that the waiver extends to the entire proceeding. *Id.* ¶ 93, at 196-97; WIGMORE, *supra* note 7, § 2328, at 638. It is not clear that it is waived for subsequent

earlier, the *Buck's County Bank* holding was limited to a very narrow factual situation,¹²² while the *Goodman* case dealt with the privilege against self-incrimination.¹²³ Both of these cases were criminal in nature, and the privilege was asserted against the government. Clearly different considerations were present, since the considerable protection provided to a defendant in a criminal trial is not necessarily appropriate in a civil suit. Further, these cases dealt with the criminal issue of admissibility rather than the civil issue of discovery. The *Diversified* court did not address the distinctions among these issues. It did, however, decline to dismiss the petition on grounds of mootness even after the petitioner obtained a copy of the report.¹²⁴ Thus, the court could be viewing the privilege in the context of admissibility,¹²⁵ but as this was not expressly stated, it can be assumed that mootness was discarded on other grounds. Otherwise, a reading of the privilege as applying primarily to admissibility coupled with a severely limited *Buck's County Bank* waiver theory would make the privilege dangerously invulnerable.

It would be difficult to extend the court's holding further without an explicit indication by the court of such an intention, as this would be a radical departure from the traditional bounds of the privilege. The most likely interpretation of the term "limited waiver" is that a waiver was effected exclusively with the SEC. This would be in accord with *Schoeberlein* and *Cote*. If the *Upjohn* opinion is read as limiting the waiver to the IRS alone, that case would also be in accord. The quality of the waiver might also be given different effect depending upon such variables as whether the present or preceding action was civil or criminal in nature, whether the waiver was toward an agency of the government or a private party, whether the disclosure was made pursuant to a court order, or whether that order was contested. Thus, a disclosure to a government

proceedings. Wigmore and McCormick both state that the privilege should be waived, but little authority can be found for their position. WIGMORE, *supra* note 7, § 2328, at 638-39; MCCORMICK, *supra*, § 93, at 197. The rationale for this is simply an extension of the doctrine that disclosure to any third person waives the privilege. *Id.*

122. See note 100 and accompanying text *supra*.

123. 289 F.2d at 256.

124. 572 F.2d at 611 n.6. See generally text at III(B), (C).

125. There is considerable authority for the proposition that unauthorized disclosure of a document does not waive the privilege. In this respect, the privilege has elements of a rule of admissibility. *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F. Supp. 863, 869 (D. Minn. 1979) (information disclosed by defecting member of organization does not waive privilege for documents including such information); *Liggett v. Glenn*, 51 F. 381, (8th Cir. 1892) (document obtained by loss or other means by third party or adversary is privileged); *Chore-Time Equip., Inc. v. Big Dutchman, Inc.*, 258 F. Supp. 233 (W.D. Mich. 1966) (attorney may not waive the privilege without the client's authority to do so); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 64 (N.D. Ohio 1964) ("only the client can unseal his attorney's lips"). Some legal scholars have also adopted the view that the obtaining of privileged attorney-client communications by unknown means without the consent of the party asserting the privilege does not constitute a waiver of the privilege. See PROPOSED FEDERAL RULES OF EVIDENCE rule 503, 56 F.R.D. at 238 (1973) (Advisory Committee's Note, subdivision (a)(4); WEINSTEIN, *supra* note 4, ¶ 503(b) [02], at 503-35; MCCORMICK, *supra* note 121, § 75; UNIFORM RULE OF EVIDENCE 26. See also note 91 and accompanying text *supra*. But see WIGMORE, *supra* note 7, § 2325, at 633.

agency pursuant to a subpoena might waive the privilege in all subsequent civil actions with that agency, yet not waive the privilege toward the world at large, or in a subsequent criminal action brought by that agency. Various other hypotheticals could be explored but this would be an idle exercise since it is not clear that the court itself had any sure idea of what explicit boundaries it would eventually place on the limited waiver.¹²⁶

An attempt to peer into the mind of the court en banc is certainly not facilitated by the court's rationale for finding a mere limited waiver. The court stated: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."¹²⁷ This is not a rationale for limiting waiver. This is a rationale for finding the existence of the privilege at the outset. The SEC ostensibly had nothing to do with the investigation at its inception. The later disclosure to the SEC had nothing to do with the investigation *ab initio*, but was merely a disclosure pursuant to an agency subpoena in connection with the agency's own investigation. The court has a strong policy argument—that of encouraging disclosure to government agencies—but this argument offered was a non sequitur with regard to the issue of waiver. Finding a limited waiver with regard to non-public disclosures to the SEC encourages such disclosures and aids the Commission, but it really has little relationship to the initial investigation.¹²⁸

A subsequent development has been the consent decree between the SEC and the Boeing Company.¹²⁹ The decree attacked this problem by establishing a Special Review Committee to review internal investigations being conducted by Boeing, and to relay all material that is not privileged to the SEC.¹³⁰ The Legal Times of Washington reported that:

The SEC view is that the Boeing Consent is in accord with *Diversified Industries, Inc. v. Meredith* in the Eighth Circuit, that is, it adheres to a

126. Other courts have recently considered similar fact situations and have arrived at a variety of conclusions for a variety of reasons. *In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979) ("the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential"); *In re General Counsel, John Doe, Inc. v. United States*, 79-1 U.S. TAX CAS. ¶ 9405 (2d Cir. 1979) (Here there was no need to decide which version of the attorney-client privilege to use, since the court found that anticipation of litigation allowed the use of the work product privilege.); *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979) ("Since *Diversified* did not require judicial intervention in the grand jury process, we do not find it to be controlling here."); *Osterneck v. E. T. Barwick Indus.*, [Current] FED. SEC. L. REP. (CCH) ¶ 96,819 (N.D. Ga. 1979) (distinguished from *Diversified* because no legal services were contemplated and the investigation was not voluntary).

127. 572 F.2d at 611.

128. Note that *Diversified* did not deal with "Special Compliance Counsel" appointed by the SEC. The federal district court for the District of Columbia in *Securities & Exch. Comm'n v. Canadian Javelin Ltd.*, 451 F. Supp. 594 (D.D.C. 1978), has held that because special compliance counsel owes his duty to the court and the public, no attorney-client privilege attaches to communications between such counsel and the corporation being monitored, thus negating any notion of waiver.

129. Boeing Consent Order, No. 78-1383 (D.D.C. July 28, 1978).

130. The Legal Times of Wash., Aug. 7, 1978, at 2, col. 2.

limited waiver interpretation of the act of filing an 8-K disclosing some internal investigation results. SEC officials necessarily oppose the assertion of the privilege where it would effectively block agency access and where they do not believe that it attaches, but they recognize that a complete waiver theory would also block disclosure; companies would balk at any disclosure for fear of triggering a waiver of the privilege as to undisclosed information.¹³¹

2. *Corporate Minutes*

The inclusion of certain parts of the report in the corporate minutes again raises the spectre of waiver, confronted in this form solely by Chief Judge Gibson in his dissent.¹³² The leading case dealing with the attorney-client privilege in the context of shareholder derivative suits, *Garner v. Wolfenbarger*,¹³³ extended the privilege to corporate minutes except where the shareholder demanded disclosure for "good cause."¹³⁴ Chief Judge Gibson suggested that this exception creates an uncertainty of confidentiality which vitiates the privilege in all cases.¹³⁵ He argued that the inclusion of these excerpts in the minutes was a breach of confidentiality. Furthermore, he claimed that publication of portions of those minutes constituted a complete waiver of the privilege, since the privilege may not be selectively waived.

This analysis fails on both points. The potential for disclosure removes neither the actual nor the intentional confidentiality of the material. The inclusion of portions of the report in the corporate minutes may be evidence that no intention that the report remain confidential ever existed. But this is far different from claiming that de facto confidentiality had ceased or from claiming that this is conclusive evidence that no intention for confidentiality existed. The potential for disclosure is not the same as disclosure, and a calculated risk does not necessarily indicate an ambivalence regarding the outcome of that risk. There is no reason why a disclosure to the stockholders must vitiate the privilege toward the world at large, if the communication is otherwise kept confidential. There is no reason why the corporate fiction should give way to the adversary system. Without more, stockholders and management should be presumed to have parallel objectives in this type of situation.

Nor does the partial disclosure of those minutes that contain no portions of the report constitute a selective or partial waiver. This analysis fails simply because it equates the minutes with the body of information

131. *Id.*

132. 572 F.2d at 616. For more on the attorney-client privilege in the context of shareholder, see Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 So. CAL. L. REV. 303 (1977); Note, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 FORDHAM L. REV. 281, 293-94 (1970).

133. 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

134. *Id.* at 1104. This showing has no relation to and should not be confused with the showing of "substantial need" required to overcome the work product privilege.

135. See Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 So. CAL. L. REV. 303, 322 (1977).

being sought through discovery. This body of information is that which the attorney-client privilege attempts to maintain intact to prevent one party from exercising biased editorial control over it. Partial disclosure of the minutes does not necessarily imply partial disclosure of the protected body of information and thus cannot be construed as a waiver of the privilege.¹³⁶

Chief Judge Gibson's observation that this was not a communication between an attorney and a client and his subsequent conclusion that this was, therefore, not protected by the attorney-client privilege runs counter to both precedent and the rationale for the privilege. The privilege extends to the substance of the communications, not to the communications themselves.¹³⁷ Intracorporate memoranda of a legal nature or dealing with other legal communications are fully protected.¹³⁸ Interestingly enough, this conclusion can be garnered not only from case law, but also from the definition of the privilege used by the majority opinion—that contained in rule 503(b)(4) of the Proposed Federal Rules of Evidence.¹³⁹

IV. SELF-EVALUATIVE REPORT PRIVILEGE

The *Diversified* court's policy arguments for the application of the attorney-client privilege in that case echo those used thirty years ago by the Supreme Court promoting the work product privilege in *Hickman v. Taylor*.¹⁴⁰ The court there stated:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹⁴¹

From the protection of opinions of counsel to the release of factual material unavailable from other sources, the mechanics of the work product privilege, and the above-quoted language, appear seductively applicable to certain parts of the material sought in *Diversified*.

Application, however, is difficult in this context because the work product privilege is well-developed and codified into a set form.¹⁴² It would have been beyond the powers of the court to apply the concrete work

136. *In re Prudence-Bonds Corp.*, 76 F. Supp. 643 (E.D.N.Y. 1948), *aff'd*, 174 F.2d 288 (2d Cir. 1949). Disclosure of privileged matter relating to a particular subject is not a waiver of privileged matter relating to other subjects. *Id.* at 647. See *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546 (D.D.C. 1970) (waiver exists when the policy behind the privilege is no longer served).

137. *United States v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964); *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964).

138. *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974); *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 38-39 (E.D.N.Y. 1973).

139. See note 25 and accompanying text *supra*.

140. 329 U.S. 495 (1947). See note 11 and accompanying text *supra*.

141. 329 U.S. at 511.

142. FED. R. CIV. P. 26(b)(3).

product privilege to the situation at hand. Thus, the Eighth Circuit chose the plastic, and explicitly noncodified, attorney-client privilege¹⁴³ to perform a function similar to that performed by the work product privilege.

There is, however, another privilege that addresses the problem more specifically—with less uncertainty in its application. This alternative approach, styled the “Self-Evaluative Report Privilege,” was first advanced in *Bredice v. Doctors Hospital, Inc.*¹⁴⁴ That case concerned a malpractice suit in which plaintiff moved for production of the minutes and reports of a hospital investigative committee whose purpose was to improve hospital care. The court noted that confidentiality was essential to effective functioning of the committee and the committee work was essential to continued improvement in the care of patients. Finding that improved care furthered a strong public policy, the court held that the committee’s deliberations should not be disclosed absent evidence of extraordinary circumstances.

A similar rationale emerged in several cases dealing with internal police reports such as arrest investigations and disciplinary inquiries.¹⁴⁵ In *Banks v. Lockheed-Georgia Co.*,¹⁴⁶ the court protected self-evaluative reports of Lockheed-Georgia’s equal employment and affirmative action compliance programs. These reports included candid self-analysis and evaluation of the company’s actions in the area of equal employment opportunity. The court concluded that to allow access to the written opinions and conclusions of Lockheed’s own evaluation staff would discourage companies from making investigations calculated to foster compliance with the law.¹⁴⁷ These policy arguments are similar to those of the work product privilege; both privileges allow a party to uncover facts and explore concepts concerning his affairs—actions which, although in

143. See McLaughlin, *The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 THE RECORD 31 (1971).

144. 50 F.R.D. 249, followed in 51 F.R.D. 187 (D.D.C. 1970), *aff’d without opposition* in 479 F.2d 920 (D.C. Cir. 1973).

145. Holmes v. Gardler, 62 F.R.D. 70 (E.D. Pa. 1974); Gaison v. Scott, 59 F.R.D. 347 (D. Hawaii 1973); Ballard v. Terrak, 56 F.R.D. 45 (E.D. Wis. 1972) (police cases). See Tucson Medical Cent., Inc. v. Misevch, 545 P.2d 958 (Ariz. 1976); Gillman v. United States, 53 F.R.D. 316 (S.D. N.Y. 1971) (hospital cases). See also Stevenson v. General Electric Co., 26 FED. RULES SERV. 2d 574 (S.D. Ohio 1978) (affirmative action plan); New York Stock Exchange, Inc. v. Sloan, 22 FED. RULES SERV. 2d 500 (S.D.N.Y. 1976) (accounting firm’s audit). Other courts have been quick to distinguish the facts in *Bredice*: United States v. Noall, 587 F.2d 123 (2d Cir. 1978) (distinguishes tax law privileges); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978) (distinguishes via foreknowledge); Davidson v. Light, 79 F.R.D. 137 (D. Colo. 1978) (distinguishes by function of committee). State courts are extremely hesitant to promulgate this new privilege: Davison v. St. Paul Fire & Marine Ins. Co., 248 N.W.2d 433 (Wis. 1977) (only legislature or Supreme Court should create privileges); Jolly v. Superior Court of Pinal County, 540 P.2d 658 (Ariz. 1975) (no privileges except in extreme circumstances); Nazareth Literary and Benevolent Inst. v. Stephenson, 503 S.W.2d 177 (Ky. 1973) (the aim of discovery is truth).

146. 53 F.R.D. 283 (N.D. Ga. 1971).

147. Cf. Horizon Corp. v. FTC, 76-2 TRADE CAS. ¶ 61,155 (D.D.C. 1976) (lower administrative law judge, in dicta, refused to apply the privilege to a report monitoring the corporation’s sales practices, saying that its primary purpose was to improve sales).

the public interest, would be contrary to the interest of the acting party if a hostile party were able to discover the results.

Although the initial Eighth Circuit panel court in *Diversified* rejected the work product privilege because the documents sought had not been prepared in anticipation of litigation, the other requirements of the privilege were met. In fact, an unexpressed difficulty in dealing with this case lies in the similarity between the corporate investigatory activities and activities that typically precede litigation. In both situations the corporation invests great time and expense to uncover facts and to obtain a legal analysis of those facts. Had the report been prepared in anticipation of litigation, it would have been protected by the work product privilege.¹⁴⁸ In fact, an action directly related to this investigation and report was later filed. Thus, timing and intent were the only factors that prevented the application of the work product privilege.

A latent assumption of the work product privilege is that legal counsel is contacted only upon the commission of a crime, the commencement of a suit, or for non-routine or adversarial legal work. This assumption, although applicable to an individual, has no relevance in the context of a corporation; for although the counsel of a natural person does not normally prepare before specific litigation can be anticipated, a corporation will quite naturally maintain a preparedness for litigation—without a specific opponent. The requirement that material produced in anticipation of litigation be protected from discovery evolved separately from the corporate sphere, severely limiting the usefulness of the privilege to a corporation—particularly in cases where no specific litigation could be anticipated.

Use of the self-evaluative privilege has several advantages over the use of the attorney-client privilege in this situation. First, it is limited to a particular situation. This would allow the attorney-client privilege to remain more narrowly defined, preventing the parade of horrors envisioned by the court in *Upjohn*.¹⁴⁹ Second, the self-evaluative privilege, like the work product privilege, is aimed at the work of uncovering and developing unknown facts for the client, rather than communication of known facts between client and attorney. Thus, the objection that corporate minutes and reports do not constitute communications would fall by the wayside.¹⁵⁰ Likewise, the issue of whether various aspects of the investigation were legal in character would need not be resolved. Third, the self-evaluative privilege has been held to be a limited privilege—like the work product privilege, but unlike the attorney-client privilege. A limited privilege allows disclosure or even selective disclosure upon a showing of substantial need and nonavailability of the material elsewhere.¹⁵¹ Thus,

148. *Diversified Indus., Inc. v Meredith*, 572 F.2d 596, 603 (8th Cir. 1978).

149. See note 48 and accompanying text *supra*.

150. Chief Judge Gibson raised this objection. 572 F.2d at 616 (Gibson, J., dissenting).

151. FED. R. CIV. P. 26(b)(3).

several courts applying the self-evaluative privilege have required production of those portions of the reports containing the facts and withheld those portions of the reports containing the self-evaluative conclusions.¹⁵² This supports discovery without exposing the client's opinions and those of his counsel.

As a preliminary step to the application of any flexible doctrine a court must look to the motivation and justification for the doctrine. Only by reference to this motivation or justification may a court justly tailor a flexible doctrine to a specific set of facts. Although the attorney-client privilege can be expanded and correspondingly contracted by a flexible court, it would be better policy to adopt the new self-evaluative privilege because it specifically addresses the problem of corporate internal investigations without the ambiguity of the tests for the attorney-client privilege. While both privileges promote attorney-client communications with a hopefully limited effect upon discovery, the attorney-client privilege becomes more difficult to apply in this factual context. First, the policy arguments encouraging application in this area have nothing to do with whether an attorney is conducting an investigation. Second, the attorney-client privilege is most justifiable and thus most easily tailored by rational thought when applied to communications of management at the discretionary decision making level. The self-evaluative report privilege is more readily understood and more easily applied to factfinding tasks and communications at the nondiscretionary level of the corporation because it is tailored to these particular situations. Because of its striking similarity to the work product privilege, pioneer cases dealing with the self-evaluative report privilege could resolve dilemmas with reference to the older privilege. This ease of application would doubtless result in more uniform applications: the key ingredient to the sense of security that these privileges are intended to foster. The attorney-client privilege is not useless in this context. It has often been used in conjunction with the work product privilege and so could be used with the self-evaluative privilege. The self-evaluative privilege would provide a limited privilege for the factual groundwork while the attorney-client privilege would provide an absolute shield for communications laden with legal opinions. Discovery would still be available on a showing of substantial need by the adverse party, while the fear of full disclosure of legal considerations need never materialize.

V. CONCLUSION

Although the corporate attorney-client privilege should be applied as narrowly with respect to subject matter as it is with an individual, it should be applied to a broad range of individuals within the corporation. Without this broad range of applicability the privilege becomes unusable. Without

152. See *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971) (statements of witnesses concerning facts were turned over, but witnesses' evaluations of facts, conclusions, and recommendations were not).

a narrow range of applicability to subject matter, the privilege becomes vulnerable to abuse. Due to the nature of the corporation, however, it often becomes difficult to separate the legal subject matter from the rest. The *in camera* review is always available, but the rule that the material is prima facie of a legal nature is necessary to protect any substance that the privilege possesses. While it is true that this rule rebels against the concept of a narrow range of subject matter, it is necessary to maintain a balanced view of the privilege within the corporation. Just as matters are less confidential within the corporate sphere than in the individual's sphere, so too are duties and interests less rigid.

Flexibility seems to be the most necessary quality for a test's application. The control group test is much too restrictive to be usable and much too arbitrary to be justified. The *Harper & Row* test is usable, but is a bit broad in its approach to subject matter, possibly leaving the road to abuse unguarded. This, however, could possibly be alleviated by a carefully-drawn definition of the privilege itself. On the other hand, by tying the privilege to only those communications made at the order of a superior, the court continues to refuse the privilege to many upper-level executives acting independently within their own realm.

Presently, although the Eighth Circuit's test is ostensibly strict, the court itself apparently feels that the test is more liberal than the control group test. That the court would adopt this attitude has a bearing on predicting how it will rule in the future. To work within the bounds of the privilege, the most important consideration would seem to be that no one communicate with a lawyer without orders from above. Once compliance with that factor is established, waiver will most likely grudgingly arise. In the context of self-evaluation, even without a nominal self-evaluative privilege, the Eighth Circuit seems willing to make an actual self-evaluative privilege out of the attorney-client privilege. Thus, although the privilege itself appears somewhat rigid in conception, it likely would prove flexible in practice.

Unfortunately, although flexibility is desired by the court at the time of application, infallibility is desired by the corporation at the time of communication. The latent obstruction to the resolution of the conflicting goals of discovery and privilege lies in the discrete nature of the attorney-client privilege. The court is thus confronted with the unfortunate dilemma of totally rejecting the pleas of one party or the other. The system needs a privilege that will allow a court flexibility, yet not threaten a corporation with total exposure of its confidential legal communications.

A court could construct a special privilege to allow a corporation, various officers, and subdivisions to conduct self-purging activities that would be considered wholly apart from other legal activities. Though this privilege could be abused, as might the attorney-client privilege, the circumstances in which the privilege would be plausibly applicable would be substantially more limited than for the attorney-client privilege. At the

same time, the attorney-client privilege could again be narrowed without fear of harming the altruistic corporation.

The optimal solution for this fact situation would be a double-tiered privilege. On a broad level, the self-evaluative report privilege would allow a corporation, various officers, and subdivisions to conduct self-purging activities that would be considered wholly apart from other legal activities. Because of its breadth, however, the privilege would be qualified like the work product privilege. At the second level, the attorney-client privilege would be an absolute shield for a narrowly construed set of legal communications. Thus, the set of privileged materials would be expanded without absolute foreclosure of discovery, while the attorney-client privilege could again be narrowed without fear of harming the altruistic corporation.

The issue of waiver has been handled in the only way reasonable. The SEC needs to pursue its activities relatively unhampered if it is to work effectively. Likewise, it is difficult to see how a corporation could ever assert the privilege for any matter of great importance when inclusion of such matter in the minutes—which are required to be kept by statute—would waive the privilege. The allowance of the privilege in such cases does no violence to the motives behind the privilege, as long as the confidentiality intentionally remains intact.

It is almost trite to say that this opinion engendered more questions than it resolved. The court never explicitly adopted a definition of the privilege that it used. If the assumption is to be drawn that Proposed Federal Rule 503 was to be used in this capacity, the court never resolved the explicit conflicts with that rule and the various other tests the court used, nor in particular with the court's exclusion of the fortuitous witness. The court never specified what was meant by "limited waiver." The court did not differentiate between the effects of the privilege upon admissibility and those upon discovery. In particular it did not specify which sources are accessible and which are privileged. This was all in addition to the seemingly loose application of strict limitations to the extent that at least one judge dissented solely on factual grounds.

The approach of the court is good in one respect—that is, the client who communicates with an attorney in good faith should not be compelled to reveal those confidences in court. The corporate client that communicates wholly internal matters to an attorney for the sake of legal advice should also expect these confidences to remain inviolate. The danger of intentionally shielding otherwise nonprivileged matter, solely for the purpose of that shield, has little real relationship to the standard a court uses for testing for the existence of the corporate attorney-client relationship. Ultimately, then, the question is either one of confidentiality or one of admissibility. The first question is easily resolved: Does the opposing party have a copy of the material sought or might it have obtained such at some past point in time? This question was left to the trial

court. The question of admissibility was not addressed. The court did say, however, that: (1) communications to legal advisors for the purpose of improved compliance with the law will be deemed of a legal nature and for legal advice; and (2) confidential disclosures to law enforcement agencies may remain as privileged as those agencies wish to keep them. It is not clear that this is an earth-shaking result, but it does bring compliance with the law into the limelight as an element in favor of the privilege.

Clyde C. Kahrl